Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 78-1842

SAM GOLDMAN,
Petitioner,

vs.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., THE HONORABLE JAMES H. MEREDITH, CHIEF JUDGE, THE HONORABLE JOHN J. NANGLE, JUDGE, and W. H. BLUMENTHAL, SECRETARY OF THE TREASURY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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INTRODUCTORY STATEMENT

This Petition for Writ of Certiorari seeks review of two companion appellate proceedings arising from the same litigation in the District Court. The first proceeding, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1427, involved the appeal of a money judgment granted Respondent Merrill Lynch arising out of certain commodities transactions between

the parties. Petitioner seeks review, under Supreme Court Rule 19, upon the ground that the Eighth Circuit, in affirming the District Court, has so far departed from accepted standards of judicial conduct as to call for the exercise of this Court's supervisory power. To this extent, the Statement of the Case concerning this portion of the case is limited mainly to the facts necessary to set forth the issues presented to the Court of Appeals, and the improper manner in which it is contended that the Eighth Circuit disposed of those issues.

The remaining portion of this Petition seeks review of supplementary judicial proceedings that were brought to enforce the judgment pending the original appeal. These proceedings resulted in a second appellate proceeding before the Eighth Circuit, *United States ex rel. Goldman v. Meredith, et al.*, No. 78-1622. Petitioner seeks review of this proceeding on the grounds that the Eighth Circuit has decided an important question of federal law concerning the Treasury Regulations governing certain Treasury obligations which have not been, but should be, settled by this Court.

OPINIONS BELOW

The opinion of the Eighth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1422, was handed down on March 14, 1979, and is officially reported at 593 F.2d 129 (8th Cir. 1979), reproduced at A-4. This decision affirmed the judgment of the District Court in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 76-852C(1), decided May 8, 1978, and officially reported at 451 F.Supp. 223. (E.D. Mo. 1978), and reproduced at A-32 as well as affirming the Order and Supporting Memorandum of the District Court of December 29, 1977 dismissing three of the four counts of Goldman's Counterclaim, which are not officially reported, but are reproduced at A-27.

The opinion of the Eighth Circuit in *United States ex rel. Goldman v. Meredith*, No. 78-1622, was handed down on April 24, 1979, and is officially reported at — F.2d — (8th Cir. 1979), and reproduced at A-14. This decision affirmed the decision and order of the District Court, which is officially reported at 80 F.R.D. 70 (E.D. Mo. 1978), and reproduced at A-38.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit in cause number 78-1422 was entered on March 14, 1979 (A-4). A timely Petition for Rehearing was denied by the Court on April 5, 1979 (A-42).

The judgment of the United States Court of Appeals for the Eighth Circuit in cause number 78-1622 was entered on April 24, 1979 (A-14). A timely Petition for Rehearing, or in the alternative for Stay of Mandate, was filed and denied as to the Petition for Rehearing, but granted as to the Stay of Mandate, on May 9, 1979 (A-43, 44). This Petition for Writ of Certiorari in both appeals has been filed within ninety days following the final consideration by the Court of Appeals in both cases. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Is it a departure from accepted judicial standards of review for a Court of Appeals to deny an appellant a new trial on an admittedly erroneously dismissed cause of action on the [incorrect] assumption that the appellant was nonetheless allowed to present evidence pertaining to the dismissed count under the aegis of the remaining portions of his case?

II

Is it a departure from accepted judicial standards of review for a Court of Appeals to sanction the District Court's deliberate disregard of evidence that would establish a positive, willful and intentional scheme to defraud a commodities investor simply because the scheme proved unsuccessful (despite resulting damage to the investor), where the anti-fraud provisions of the Commodities Exchange Act expressly declares even an "*attempt* to cheat or defraud" to be unlawful?

III

Is it a departure from accepted judicial standards of review for a Court of Appeals to permit the ultimate fact findings of a District Court to stand where the District Court (1) made admittedly erroneous fact findings concerning key underlying factual issues, and (2) has committed mistakes of law in failing to acknowledge the existence of the very cause of action to which the fact findings pertain?

IV

Is it a denial of an appellant's right to challenge a fact finding of a District Court as lacking "substantial evidence" for a Court of Appeals to decline to review that fact finding on the sole basis that a witness credibility issue was involved, and therefore required automatic deferral to the District Court, even though the fact finding centered around documentary evidence?

V

Does 31 CFR § 350.16(b) prohibit the Treasury Department from accepting judicial process or other means of execution for the purpose of executing upon book-entry Treasury bills in satisfaction of a money judgment?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved herein are the Commodity Exchange Act, 7 U.S.C. § 1 et seq., particularly § 6b, (A-1) and the Treasury Regulations governing book-entry Treasury bills, 31 CFR, part 350, in particular § 350.16(b) (A-3).

The pertinent parts of these enactments are as follows:
7 U.S.C. § 6b [pp. 856-57 (1976 ed.)]:

> It shall be unlawful (1) for any member of a contract market . . . or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale on any commodity for future delivery . . . for or on behalf of any other person. . .
>
> > (A) to cheat or defraud or attempt to cheat or defraud such other person; [or]
> > (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

31 CFR § 350.16(b) [pp. 785-86 (July 1, 1978 ed.)]:

> The Treasury will not under any conditions accept notices of pending judicial proceedings, or of judgments in favor of creditors, or others, of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills.

STATEMENT OF THE CASE

This action was initially brought by Respondent, Merrill Lynch, Pierce, Fenner and Smith, Inc. [hereinafter referred to as "Merrill Lynch"] as a diversity action under 28 U.S.C. §1332(a)(1), in the District Court for the Eastern District of

Missouri [cause number 76-852(c)(1)] to collect $119,145.00 it claimed Petitioner Sam Goldman [hereinafter referred to as "Goldman"] owed it after liquidation of a commodities margin trading account which Goldman had with Merrill Lynch, and from which he had purchased five Mexican Peso contracts.

Goldman counterclaimed in four counts. Count I alleged that Merrill Lynch had committed both common law and statutory fraud under the Commodity Exchange Act, 7 U.S.C. §6b by making certain alleged misrepresentations in May, 1976, through its agent, Stephen Palmen [hereinafter referred to as "Palmen"], that Mexican Peso contracts were safe investments without substantial risk, and that there would be no devaluation of the Peso prior to December 1, 1976, when a change of presidential administration was to take place.

Count II, which reincorporated Count I and 7 U.S.C. §6b as a basis for liability, alleged that Merrill Lynch, through Palmen, further engaged in a scheme to defraud Goldman by wrongfully attempting to involve him in an advanced commodity program offered by Merrill Lynch known as a $50,000.00 Guided Account Program. Under this program, qualified investors deposited $50,000.00 with Merrill Lynch to be used as margin money for the purchase of commodities futures contracts. However, before an individual could qualify for this program, he first had to be granted $50,000.00 in margin trading limits by Merrill Lynch, which in turn required that the individual be worth at least $500,000.00 to qualify for such limits. The crux of the fraud alleged was that Palmen, the broker, submitted false financial statements to his superiors, without Goldman's knowledge, indicating that Goldman, whose actual net worth was only $230,000.00, was worth $2,000,000.00 in an attempt to make Goldman appear qualified for participation in this program. The broker denied responsibility for the false financial statements, blaming Goldman, but did admit that he actively solicited Goldman's participation in this program (which generated a large volume of commissions) and that he did make

repeated requests that Goldman's trading limits, which were never more than $25,000.00, be raised to $50,000.00.

Palmen was still trying to interest Goldman in the $50,000.00 Guided Account Program when the Mexican government announced a "float" of the Peso on August 31, 1976, which resulted in a 44% drop in Peso values over an eight day period. This drop caused a corresponding depreciation in the value of Goldman's five Peso contracts (which had been purchased on margin of only $12,000.00), and resulted in his account being liquidated at a loss of over $119,000.00. While Goldman did not get into the Guided Account Program prior to his account being liquidated, he nonetheless claimed to have been damaged by the false financial statement that he alleged Palmen had submitted on him; Merrill Lynch having admitted that its basic initial decision approving Goldman to trade commodities and open a general commodities account was based solely on the financial statement submitted by Palmen. Under Merrill Lynch acceptance standards and rules, a minimum annual income of $25,000.00 was required to open such an account, and while the false financial statement indicated Goldman's income to be $50,000.00, in fact his annual income was only between $12,000.00 to $16,000.00.

Count III alleged a cause of action based upon Merrill Lynch's failure to observe the duties owed Goldman as a client relating to basic supervision and review of accounts and suitability requirements, as well as "know your customer" responsibilities. Liability was premised upon violation of such responsibilities both as a matter of law reflecting good brokerage practice, as well as Merrill Lynch's own self-imposed house rules and corporate policies (portions of which are reproduced in note 8 of the Eighth Circuit's Opinion, A-10-11).

Count IV, which alleged a breach of fiduciary duty relating to conflict of interest and alleged possession of inside information, was not involved on Appeal.

Prior to trial, on December 29, 1977, the District Court sustained Merrill Lynch's Motion to Dismiss Counts II, III and IV. The order and supporting memorandum are not reported, but are reproduced herein at A-27. Basically the District Court dismissed Count II as being largely repetitive of Count I, and that Count III, dealing with the rules violations, failed to state a recognized cause of action. The case was tried by the District Court sitting without a jury on February 21, 1978, with only Count I of Goldman's Counterclaim (concerning the alleged misrepresentations about the Peso) being formally before the Court. The District Court rendered its judgment on May 8, 1978 for Merrill Lynch giving it full judgment for $119,145.00, plus interest, and against Goldman on the remaining Count of his Counterclaim; finding that Merrill Lynch made no misrepresentations concerning the safety of the Peso.

An appeal was taken to the United States Court of Appeals for the Eighth Circuit on June 6, 1978, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1427. Goldman initially sought review of certain fact findings under the "clearly erroneous" standard of F.R.Civ.P. 52(a). Among the major fact findings challenged as lacking "substantial evidence" was the District Court's determination that Goldman himself, and not the broker, Palmen, was responsible for the false information furnished on the financial statement known as the New Account Information Form.[1] The Court of Appeals, however, declined to overturn this finding, stating that ". . . this finding was based to a large extent upon the district court's evaluation of the credibility of the witnesses, to which we defer." [A-10].

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[1] This document, exhibit 1, has been reproduced at A-45. There was never any question that this document was false, only as to who was responsible for it. The document was signed by the broker, Palmen, as well as his supervisor and office manager, Boynton Hussey, but not by Goldman (and in fact there was not even a signature line for the client), and stated the following information: That he was married (false, Goldman was a life-long bachelor); Age: 40 (false, age 6⁻); A manufacturer's representative: (false, Goldman was a lawyer, now semi-retired); was experienced in futures speculation (false, no such experience), and had a net worth of $2,000,000.00 (false, $230,000.00), with an annual income of $50,000.00 (false, $12,000.00 to $16,000.00). It was Goldman's contention that Palmen's mere uncorroborated verbal denial was not "substantial evidence" to contradict a written document bearing Palmen's signature. Moreover, it was submitted that two entries on the form for which Palmen did admit responsibility: that (1) he had known Goldman for "two months" and (2) his "relationship to the customer" was that of "friend," were admittedly false (Palmen never having met Goldman until the date the form was allegedly prepared), constituted conclusive admissions on the very face of the document that Palmen was responsible for its overall falsity. Goldman also introduced a copy of a personal and financial statement which he had coincidentally given to another brokerage company during this very same time period which accurately stated the foregoing background and financial information.

Goldman also challenged as being entirely without evidenciary basis the District Court's finding that Merrill Lynch originally extended him a $50,000.00 margin trading limit. Goldman argued that it was because his limits were only $25,000.00 that Palmen was motivated to falsify his financial statement to make him appear eligible for the $50,000.00 Guided Account Program. Therefore, if the District Court misunderstood this basic fact, then its ultimate determination about who prepared the false financial statement was also suspect. The Court of Appeals agreed that this was a clearly erroneous finding, noting that even Merrill Lynch had conceded that Goldman's margin trading limits were never more than $25,000.00, but concluded that this error did not prejudice Goldman's case. [A-8].

The remaining portion of Goldman's appeal dealt with the propriety of the District Court's dismissal of Counts II and III as a matter of law. Under Count II, Goldman argued that if in fact Palmen was responsible for preparation of the false financial statement as part of a scheme to defraud him, then it stated a private cause of action for violation of the Commodity Exchange Act, 7 U.S.C. §6b(A), (B).

The Court of Appeals acknowledged that a private cause of action exists for such violations of the Commodity Exchange Act [n.7, A-10], but determined that the dismissal was not prejudicial because it felt that Goldman was nonetheless allowed to present his statutory fraud claim under the aegis of Count I. The Court apparently adopted the District Court's conclusion that the statutory fraud alleged in Count II was basically the same fraud as alleged in Count I. *Id.* Furthermore, the Court of Appeals also concluded that "Although Counts II, III and IV were dismissed, the district court did permit appellant to introduce evidence relevant to these counts." [A-6].

Goldman sought a rehearing of this determination, wherein he challenged the basic assumptions underlying the Eighth Circuit's decision. He sought, without success, to demonstrate that the District Court, at trial, did not recognize his statutory fraud claim concerning the Guided Account Program, and disregarded any evidence offered in support of it; limiting its attention and consideration solely to the fraud alleged in connection with the safety of the Peso.[2]

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[2] Several times Goldman attempted to introduce evidence bearing upon the statutory fraud alleged under Count II, concerning the Guided Account Program, such as to explain the nature of the program, Palmen's formal request to raise Goldman's limits to $50,000.00, and so forth. Each time, these attempts were met with the following response by the Court:

> THE COURT: Well, I'll sustain the objection to anything about [the] Guided Investment Program for the reason that he didn't go into it. So it doesn't make any difference what it was." (Tr. 43-44).
>
> * * * * * * * *
>
> THE COURT: . . . the facts are, as I understand it, and you'll correct me if I am wrong, he did not get in this program. Is this right?
>
> MR. RADLOFF: That's correct, your Honor.
> THE COURT: All right. Then I don't want to hear anymore about this program.
>
> MR. RADLOFF: May I cite you one point. Part of our case, your Honor,—it's in two parts—even in Count I. It's common law fraud and it's also statutory violation of [the] Commodities Exchange Act, and under Section 6b it covers an attempt to cheat or to defraud, and that is a basis upon which we are——
>
> THE COURT: I understand that's an attempt, but he didn't get into it. (Tr. 50-51).
>
> * * * * * * * *
>
> THE COURT: Well, I think we're getting very far afield, and since this is before the Court, if you make it brief, I am going to let you get into it very briefly, but *I don't think it has one single, solitary thing to do with this lawsuit, because he never got into it. . . . and if they defrauded him in this Peso deal, that's one thing. If they didn't, then that's something else.* (Tr. 61-62).

Goldman also challenged the dismissal of Count III, which alleged a cause of action for numerous violations of Merrill Lynch's duties to "know your customer" and provide general supervision of the handling of his account. The Court of Appeals agreed with Goldman that he stated a cause of action, and that the District Court should not have dismissed Count III [A-13]. However, the Court concluded that the dismissal of this cause of action did not constitute reversible error because ". . . the district court permissibly found that appellant failed to prove fraud on the part of Merrill Lynch." *Id.*

Goldman, in his Petition for Rehearing, disputed the Court's disposition of Count III, arguing that he was not given a full and fair opportunity to prove the necessary conduct "tantamount to fraud" that would have established his cause of action. His contentions were two-fold. In the first place, he disputed the Court of Appeals' assumption that the District Court allowed him to introduce evidence relevant to the fraud alleged in Count II [A-6]; citing to the Court's attention the remarks of the District Court [reproduced in note 2, *supra*], which clearly indicated that the District Court was unwilling to consider other conduct that would constitute fraud. In the second place, it was contended that the District Court's admittedly erroneous fact

finding that Goldman had been extended $50,000.00 in margin trading limits [instead of $25,000.00] vitiated the fact finding process and the District Court's conclusion that Goldman failed to prove fraud. Goldman argued that he could not possibly hope to prove that Palmen falsified his financial statement for the purpose of raising his limits from $25,000.00 to the $50,000.00 necessary to participate in the Guided Account Program if the District Court was operating upon the mistaken assumption that his limits were already $50,000.00.

The Court of Appeals declined to reconsider the issues raised in this proceeding and denied Goldman's Petition for rehearing on April 5, 1979, from which Goldman now seeks review by this Honorable Court.

* * *

After the District Court had rendered its decision, and during the time the appeal of that decision was pending before the Court of Appeals in cause number 78-1427, Merrill Lynch attempted to execute upon its money judgment in the absence of a supersedeas bond being posted by Goldman. After its initial execution was returned unsatisfied, Merrill Lynch, pursuant to F.R.Civ.P. 69(a), conducted a judgment debtor examination which revealed that Goldman, who had previously maintained large sums (e.g., $50,000.00) in government Treasury bills, had converted most of his investments and assets into government Treasury bills in an amount totaling $205,000.00.

The particular Treasury bills held by Goldman are known as book-entry Treasury bills, and have only been available in recent years. They are unique in the sense that they are not evidenced by any definitive physical documents or engraved certificate, but rather exist only as entries on the books of the Treasury Department, for which the holder only receives a "receipt" as confirmation of the transaction. Under 31 CFR § 350.16(b) [A-3] it is stated that:

> The Treasury will not under any conditions accept notice of pending judicial proceedings, or of judgments in favor of creditors or others, or of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills.

Furthermore, under 31 CFR § 350.08, the ownership of book-entry Treasury bills may only be transferred by certified request of the depositor-owner.

Because of the uncertainty that these book-entry Treasury bills could be reached by garnishment or other execution directed against the United States Government, Merrill Lynch made application to the District Court initially seeking to temporarily restrain Goldman from transferring or cashing out his Treasury bills, and ultimately seeking a mandatory injunction requiring Goldman to execute the necessary forms to transfer the Treasury bills to Merrill Lynch.

On July 12, 1978, a Show Cause Order was issued by the District Court, ". . . why a temporary injunction should not be granted restraining Defendant from cashing out or transferring his ownership of the book-entry United States Treasury bills . . ." After a preliminary hearing, the District Court entered its order granting not only the preliminary prohibitory injunction, but also granting Merrill Lynch the mandatory injunction it was ultimately seeking; ordering Goldman to cash sufficient Treasury bills to satisfy the judgment plus interest, but staying enforcement of that portion of the order pending determination of the appeal of the underlying judgment.

Subsequently, on or about August 17, 1978, the Secretary of the Treasury filed an Answer and Return to the garnishment which had been previously served upon the Treasury Department. That Answer indicated that the Treasury Department held Treasury bills belonging to Goldman in the sum of $170,000.00 which, pursuant to the District Court's previous order directed

against Goldman, had been restrictively marked so that they could not be cashed or withdrawn. The Treasury Department further answered that this was a case of first impression since book-entry Treasury bills were a new form of government securities, and that the obligation of the United States in this form is not capable of physical delivery such as a "bond" or by delivering a check. The Treasury Department indicated that the Treasury bills would first have to be transferred through the Federal Reserve Bank Communications System into a book-entry account maintained by a member bank in the Federal Reserve System before execution sale could be had. The Treasury Department's Answer concluded, however, that it would abide by whatever order the Court might make concerning disposition of the Treasury bills.

Upon receiving this Answer from the Treasury Department, Merrill Lynch immediately applied to the District Court for an order directing the seizure and transfer of the Treasury bills through the Federal Reserve Communications System, in accordance with the procedures set forth by the Treasury Department.

Goldman challenged the propriety of these actions, in view of Treasury Regulation 31 CFR § 350.16(b), by seeking alternative writs of mandamus and prohibition against both the District Court and the Secretary of the Treasury in what became known as *United States ex rel. Goldman v. Meredith, et al.* No. 78-1622 in the United States Court of Appeals. The Eighth Circuit granted the preliminary relief sought by Goldman in its Order of September 5, 1978, which stayed any actions to enforce the judgment out of the Treasury bills, as well as continuing the preliminary injunction restraining Goldman from cashing out or transferring the Treasury bills, pending determination of the original appeal.

This appeal was argued and submitted with the main appeal. On April 24, 1979, after the main appeal had been affirmed,

the Court of Appeals rendered its decision. The Court first held that the mandatory injunctive relief sought was available and proper unless it served to circumvent a stated government policy prohibiting the attachment of the Treasury bills [A-20]. The Court then avoided this potential problem by holding that the Treasury Regulations did not prevent book-entry Treasury bills from being subject to judicial process and execution [A-25-26]. Goldman filed his Motion for Rehearing on May 3, 1979, which the Court denied on May 9, 1979. The Court did, however, grant its Stay of Mandate on that same date to allow Goldman to seek review by this Court because of the substantial question presented concerning the interpretation of these Treasury Regulations.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

The Actions by the Court of Appeals in the Main Appeal (No. 78-1427) Indicate Such a Substantial Departure From Accepted Standards of Judicial Conduct So as to Call for the Exercise of This Court's Supervisory Power.

Petitioner Sam Goldman sought review by the Court of Appeals raising allegations of error by the District Court as to both fact and law; many of which the Eighth Circuit was constrained to agree existed. Yet, by a process of isolating these errors, rather than considering their overall effect, combined with a reliance upon demonstrably faulty factual and legal assumptions, the Eighth Circuit has managed to characterize these errors as not "prejudicial" or "reversible." For the reasons that follow, Petitioner Goldman respectfully submits that this disposition of his appeal represents such a substantial departure from accepted standards of judicial appellate review as to call

for the exercise of this Court's supervisory power under its Rule 19.

First and foremost is the fact that the Court of Appeals has managed to minimize as harmless the improper dismissal of two entire counts of Goldman's counterclaim (II and III), which even it was constrained to agree stated recognized causes of action (A-10, 13). It rationalized the improper dismissal of Count III, the "Rules Violations," on the basis that Goldman failed to prove fraud in connection with these rules violations. (A-13). But how does Goldman prove fraud in relationship to a count that the District Court does not even recognize as stating a cause of action? How does Goldman prove fraud when three-fourths of his Counterclaim is improperly dismissed before trial, especially when those dismissed counts contain the allegations that Merrill Lynch failed to "know its customer" because of its agent's *fraudulent* falsification and concealment of Goldman's personal and financial background? And how does Goldman prove that Merrill Lynch's agent intentionally falsified his financial statement for the purpose of raising his margin trading limits from $25,000.00 to the $50,000.00 necessary for participation in the Guided Account Program when the District Court has the erroneous understanding that Goldman's limits were $50,000.00 all along? Indeed, how can the Eighth Circuit minimize this factual error as not prejudicial (A-8) when it forms one of the key factual premises of Goldman's case, and then justify the improper dismissal of Count III on the basis that the District Court did not find fraud? Clearly, the Eighth Circuit has engaged in circular reasoning to reach the desired result.

But the Eighth Circuit apparently justified its conclusion on the basis that "Although Counts II, III and IV were dismissed, the district court did permit appellant to introduce evidence relevant to these counts." (A-6). Even if this assumption was true, and it is not, it is still no excuse for the improper

dismissal of an entire cause of action. This Court has held before that a litigant should be ". . . accorded the right to prepare his case and plan the strategy of trial with the knowledge that the . . . [improperly dismissed count is] properly before the court." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 93 S.Ct. 1817, 1823 (1973).

But the assumption of the Court of Appeals is not true. The District Court did not consider Goldman's evidence or contentions relative to the dismissed counts. The District Court's own remarks [reproduced in pertinent part in note 2, *supra*] make it clear beyond doubt that it was limiting its consideration solely to ". . . this Peso deal" [Count I], stating that anything else, especially the fraud alleged in connection with the Guided Account Program [Count II], had not a ". . . single, solitary thing to do with this lawsuit because he never got into it." (Tr. 61).[3]

Similarly, serious questions must be raised about the Court of Appeals sanctioning the dismissal of Count II, involving the more sophisticated scheme to defraud dealing with the Guided Account Program and the false financial statement. The Court of Appeals, while acknowledging that a violation of the statutory anti-fraud provisions of the Commodity Exchange Act gives rise to a private cause of action, refused to reverse and remand. It adopted the District Court's conclusion that this statutory fraud was raised in Count I, and held that it was given adequate consideration and ultimately rejected; even though it had to concede that this fraud ". . . was more explicitly set forth in Count II." n.7, A-10).

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[3] That the record contains any references to the Guided Account Program was mainly due to the stubborn persistence of Goldman's counsel who, in hindsight, would have been better off simply accepting the District Court's initial refusal to hear his evidence, thereby leaving the Court of Appeals no choice but to remand. But the District Court, in letting this evidence in, made it clear that it was doing so ". . . primarily for the purpose so that the record will show what the program is all about. I don't think it has a great deal to do with this lawsuit, but you seem to think it does." (Tr. 243).

But if Count II stated a cause of action, then it never should have been dismissed in the first place. If Merrill Lynch, through its agent, committed an *intentional act of fraud* in falsifying Goldman's financial statements, then Goldman had a right to fully present it; both as stating an independent cause of action under the Commodity Exchange Act, 7 U.S.C. § 6b(A)(B), and also to the extent that it would provide the fraud necessary to make the rules violations actionable under Count III. The dismissal of Count II cannot be justified on the assumption that it was repetitive of Count I, for it is not. Count I alleged a traditional face-to-face representation concerning the Peso's stability. Count II involved a separate and much more sophisticated scheme to defraud, of which Goldman was unaware, dealing with the Guided Account Program and the misrepresentation of Goldman's financial abilities. Furthermore, the above mentioned actions and statements of the District Court (notes 2 & 3, *supra*) make it clear that it did not treat Count II as being before the Court under the guise of Count I. In any event, the fact remains that Goldman was not ". . . accorded the right to prepare his case and plan the strategy of trial with the knowledge that . . . [Count II] was properly before the District Court." *McDonnell Douglas Corp. v. Green, supra.*

Still other questions exist concerning the Eighth Circuit's disposition of this case. Goldman challenged many of the fact findings of the District Court; an admittedly difficult process. In particular, Goldman sought to question the District Court's ultimate factual finding that it was he, and not Palmen, who was responsible for the preparation of the false financial statement. He challenged this finding on the bases that: (1) the District Court had committed errors of law in not recognizing the causes of action stated in Counts II and III, thereby necessarily vitiating its fact findings; (2) the District Court had committed underlying mistakes of fact in not recognizing Goldman's actual margin trading limits, which was imperative to understanding why Palmen had a motive to falsify the financial

statement; and (3) that there was no "substantial evidence" to support the District Court's finding.

While it is neither necessary nor proper to argue the evidence that was presented to the District Court [the basic contentions of which are set forth in note 1, *supra*], the fact remains that Goldman was entitled to a judicial review of the questioned fact finding, if only to have the reviewing court determine that it was supported by "substantial evidence." But for the Court of Appeals simply to defer to the District Court's finding on the basis that it involved a credibility issue (A-10) is to deny Goldman his right of review, no matter how limited. To say that there is an issue of credibility does not answer whether there was any substantial evidence to support that particular finding, especially when that finding centers on evidence, documentary in nature. *See generally, Gay Lib v. University of Missouri,* 558 F.2d 848, 853 (8th Cir. 1977).

The preceding discussion raises one last criticism of the Eighth Circuit's handling of this appeal. This concerns the fact that the District Court was totally unwilling to consider Goldman's allegations of fraud in connection with the Guided Account Program if it did not result in his participation. In effect, the attitude of the District Court, and one which the Court of Appeals has sanctioned, is that it will ignore an *intentional act of fraud* because the fraud did not succeed; even though Goldman was just as effectively damaged by the misrepresentation of his personal and financial abilities since it affected Merrill Lynch's treatment of him.

Certainly the failure of the scheme does not lessen its wrongfulness. But more important is the fact that the attitude of the Eighth Circuit runs afoul of Congressional intent in re-enacting the Commodity Exchange Act in 1974. Congress re-enacted and strengthened this Act for the very purpose of cracking down on the manipulative schemes, deceptions and frauds so prevalent

in the commodities field. *See Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103-104 (7th Cir. 1977). But both the District Court and the Court of Appeals have ignored Goldman's claim of fraud solely on the ground that the fraud failed. Can such an attitude be sanctioned by this Court when § 6b of the Act goes so far as to even make the "*attempt* to cheat or defraud" unlawful? If nothing else, a violation of this section must raise serious questions about Merrill Lynch's right to recover in this lawsuit.

Goldman, in his Petition for Rehearing, sought to demonstrate the Eighth Circuit the very errors which he raises in this Petition. And yet the Eighth Circuit ignored his arguments, still insisting that he has had his day in court; binding him to the "findings" of a trial that largely never took place. It has affirmed the decision of the District Court by relying upon a fact finding process that is riddled with errors of both fact and law. Such an attitude simply cannot be tolerated. The ultimate fact remains that the District Court improperly dismissed two entire counts of his Counterclaim which he had an absolute right to present from the very beginning of this case. For these reasons, Goldman respectfully submits that the Eighth Circuit has so far departed from accepted judicial standards of conduct, raising such serious questions about the proper functioning of the federal appellate system, that it calls for the exercise of this Court's supervisory powers.

II

The Interpretation of Whether 31 CFR § 350.16(b) Was Intended to Exempt Book-Entry Treasury Bills, a New Form of Government Obligation, From Judicial Process Presents an Important Federal Question Which Should Be Passed Upon by This Honorable Court.

The decision of the Eighth Circuit that 31 CFR § 350.16(b) does not insulate book-entry Treasury bills from judicial process was based largely upon the existence of general Treasury regulations that expressly provide for the judicial transfer of certain types of Treasury obligations, known as "transferable securities;" citing 31 CFR § 306.0, 306.100, 306.101 (A-23). It is respectfully submitted that the Eighth Circuit's reliance upon these general regulations to justify its interpretation of § 350.16 (b) is greatly in error.

In the first place, § 349.2, governing book-entry Treasury bills, states that such Treasury bills shall be subject to 31 CFR, part 306 only "to the extent applicable." However, an examination of § 306.100, reveals that it is applicable only to "*transferable* securities." Under the definitions provided in § 306.2(q), "Transferable Securities" are defined as:

> . . . securities which may be sold on the market and transfer of title accomplished by assignment and delivery if in registered form, or by delivery only if in bearer form.

By contrast, § 306.2(j) states that "Non-Transferable Securities" are:

> . . . those issued only in registered form which according to their terms are payable only to the registered owners or recognized successors in title to the extent and in the manner provided in the offering circulars or special applicable regulations.

It should be apparent that book-entry Treasury bills are not "transferable securities" as that term is used in § 306.100, upon which the Court of Appeals relied. *See* 31 CFR §§ 350.8; 350.-16(a).

Moreover, the inapplicability of §306.100 to book-entry Treasury bills is apparent on its face, for it requires the ". . . *presentation* of the securities . . ." as part of the outlined pro-

cedure. Yet, book-entry Treasury bills, as made clear by the Treasury Department's Answer to the garnishment, are not evidenced by any ". . . definitive security, the possession of which is physically transferable." Therefore, since book-entry Treasury bills do not exist in physical form, they are incapable of physical presentation, which should make it clear that they are not among the Treasury securities for which judicial transfer is contemplated under §306.100 et seq.

While holding that the Treasury bills were subject to judicial process, the Eighth Circuit conceded that it was "somewhat perplexed" by the language of 31 CFR §350.16(b), which, it admitted, seemed to say just what Goldman said it did. (A-23). Therefore, to bolster its holding, the Court deemed it wiser to narrowly construe the term "notice," as used in that regulation, to refer to something less than a judicial order or process; *e.g.*, "a letter referring to a judgment instead of a certified copy of the judgment." (n.9, A-23-24). Goldman respectfully submits that this interpretation is both strained and unjustified.

It is a well known rule of judicial construction that legislative and regulatory enactments should never be interpreted so as to render the provision meaningless. Yet, the Eighth Circuit's interpretation does just that. The non-judicial notices that the Court of Appeals refers to, such as a letter of a judgment creditor to a garnishee, have never been recognized as being entitled to any legal recognition, or having the power to attach assets and bring them into court. The result is that the Eighth Circuit has interpreted this Treasury regulation in such a way that it is meaningless in that it neither modifies nor changes the existing state of the law.

Moreover, an overall reading of the regulatory scheme set forth in 31 CFR, part 350, indicates that book-entry Treasury bills were to enjoy a special and unique status as government securities, rendering them almost untouchable by anyone other

than the owner. Section 350.16(a) makes it clear that the only provision for *involuntary* transfer of such Treasury bills is in situations where the original owner has ceased to exist as a legal or competent entity, in which case a duly appointed ***representative or successor-in-interest*** to the original owner will be recognized upon following the prescribed procedure. Conversely, nowhere in part 350 is provision made for the recognition of those claiming an interest in the Treasury bills *adverse* to the owner. Had the Treasury Department intended to provide for such judicial transfer and recognize executions pertaining to book-entry Treasury bills, it very easily could have done so, as it has in the case of other Treasury securities. But the absence of such a provision, coupled with the overall regulatory scheme of 31 CFR, part 350, and in particular the sweeping, all-inclusive language contained within § 350.16(b), would seem to indicate that a broad, rather than narrow, interpretation of that section is called for.[4]

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[4] Goldman would make it clear that he is not advocating that these regulations be used as a shield for fraud, for he recognizes that the necessary relief should be available where the circumstances manifest fraud. *Free v. Bland*, 369 U.S. 663, 670, 82 S.Ct. 1089, 1094 (1962). But it should be pointed out that Merrill Lynch has never raised, or even alleged, that Goldman has acted fraudulently towards them, and under these circumstances, such is not an issue in this case. *Id.* at 671/1094.

CONCLUSION

It is respectfully submitted to this Honorable Court that the questions raised in the original Appeal, No. 78-1427, present a compelling need for the exercise of this Court's supervisory powers to restore the credibility of the appellate process.

It is furthermore submitted that the issues presented in the supplementary appellate proceeding, No. 78-1622, present a compelling federal question of national importance concerning a new form of Treasury obligations through which substantial portions of the general revenues are raised. It is therefore respectfully requested that this Honorable Court issue its writ of certiorari to review both of the decisions below.

Respectfully submitted,

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Attorney for Petitioner

I hereby certify that the necessary copies of this Petition for Writ of Certiorari have been served upon all parties of record by depositing the same in the United States mails, first-class postage prepaid, addressed to respective counsel of record at their stated post office addresses.

STUART J. RADLOFF

APPENDIX

APPENDIX A

7 U.S.C. § 6b. **Contracts Designed to Defraud or Mislead; Bucketing Orders; Buying and Selling Orders for Commodities**

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person: or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided,* That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange; *And provided further,* That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

§ 350.16 **Transactions in Regular Course—Notices Not Effective—Unacceptable Notices.**

(a) *Transactions in regular course—notices not effective.* Transfers of book-entry Treasury bills, payment thereof or reinvestment at maturity or any other transaction therein will be conducted in the regular course of business in accordance with this subpart, notwithstanding notice of the appointment of an attorney-in-fact, or a legal guardian or similar representative, or notice of successorship, the termination of an estate, the dissolution of an entity, or the death of an individual, unless the requisite request, proof, and the evidence necessary to establish entitlement under this subpart is received by the Bureau no later than ten business days prior to the maturity date of the bills.

(b) *Unacceptable notices.* The Treasury will not under any conditions accept notices of pending judicial proceedings, or of judgments in favor of creditors or others, or of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills.

APPENDIX B

United States Court of Appeals for the Eighth Circuit

No. 78-1427

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Appellee,
v.
Sam Goldman,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 17, 1978
Filed: March 14, 1979

Before Stephenson and McMillian, Circuit Judges, and Robinson,* Senior District Judge.

McMillian, Circuit Judge.

Appellant Sam Goldman appeals from a judgment entered by the District Court for the Eastern District of Missouri[1] in favor of appellee Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch). Merrill Lynch initiated the action to recover an alleged deficiency of $119,145.00 in appellant's commodities margin trading account.[2]

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* The Honorable Richard E. Robinson, Senior District Judge for the District of Nebraska, sitting by designation.

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri.

[2] The basis of jurisdiction was diversity of citizenship. Merrill Lynch is a Delaware corporation with its principal place of business in New York; appellant is a resident of Missouri.

For reversal appellant argues that the district court erred in (1) making certain findings of fact and conclusions of law, (2) not finding that false financial statements were submitted by broker Palmen and thus constituted a violation of the antifraud provisions of the Commodities Exchange Act, 7 U.S.C. § 6b, and (3) dismissing Count III of appellant's second amended counterclaim. For the reasons discussed below, we affirm the judgment.

In early May of 1976, appellant opened a commodities margin trading account with Merrill Lynch. Appellant's account executive was a broker named Stephen Palmen. Appellant eventually purchased five futures contracts through Merrill Lynch. These contracts were agreements to purchase one million pesos on a given maturity date at a given price. Unfortunately for appellant, on August 31, 1976, the Mexican government announced that it would no longer support the peso at the fixed rate of eight cents per peso and instead would permit the peso to "float." As a result, the peso decreased markedly in value. Appellant sustained an approximate loss of 44% of his entire investment.

Of more immediate concern, however, was the fact that the International Monetary Market substantially increased its margin requirements in light of the peso devaluation. On September 2, 1976, Merrill Lynch notified appellant of the increased margin requirements and requested appellant to deposit $125,000 in satisfaction thereof. Appellant did not do so. On September 8, 1976, Merrill Lynch sold appellant's five peso futures contracts at a loss of over $119,000 to appellant's account. This sale was pursuant to the broker-client Commodity Account Agreement.[3] The deficiency in appellant's account is the subject of this litigation.

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[3] The Commodity Account Agreement (Exhibit No. 2) is one of several forms filled out by persons opening commodities margin trading accounts. Basically, the agreement authorizes Merrill Lynch to

Appellant filed a counterclaim in four counts, which appellant characterized[4] as alleging common law fraud (I), statutory fraud in violation of the Commodities Exchange Act, 7 U.S.C. § 1 *et seq.* (II), breach of Merrill Lynch's "duty to know your customer" and to supervise the account (III), and conflict of interest (IV). Although Counts II, III and IV were dismissed,[5] the district court did permit appellant to introduce evidence relevant to these counts. After a trial, the district court entered its judgment in favor of Merrill Lynch for $119,145.00 plus interest. The district court specifically found that Merrill

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sell any or all of the commodities or contracts in an account whenever in its discretion it considers it necessary and to hold the investor liable for any deficiency remaining in the account in the event of liquidation.

[4] Appellant's characterization of Count II is disputed by Merrill Lynch. Merrill Lynch argues that Count II did not, as alleged by appellant, allege that Palmen intentionally submitted a false financial statement on appellant in violation of the Commodities Exchange Act, 7 U.S.C. §6b. Count I alleged that Merrill Lynch, through Stephen Palmen, defrauded appellant by misrepresenting the soundness of the peso as an investment in violation of the Commodities Exchange Act, 7 U.S.C. §6b, o. Count II adopted all of Count I and further alleged that Merrill Lynch, through Stephen Palmen, defrauded appellant by "wrongfully" attempting to enlist appellant in the Guided Investment Program in violation of exchange rules, Merrill Lynch's house rules and good brokerage practice. Count III adopted all of Counts I and II and further alleged that Merrill Lynch breached its duty to adequately review and supervise appellant's account. Appellant specifically asserted that Palmen was the source of the false and inaccurate financial and personal information on the New Account Information form (Exhibit No. 1). Count IV adopted all of Counts I, II and III and further alleged that Merrill Lynch had inside information about the devaluation of the peso which it selectively disclosed in reckless disregard of appellant's financial welfare. Appellant was unable to establish either that Merrill Lynch knew in advance of the devaluation or had disclosed such information to selected customers. "For all practical purposes, Count IV is not involved in this appeal." Brief of Appellant at 8.

[5] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 76-852C(1)(E.D. Mo., Dec. 29, 1977) (order granting plaintiff's motion to dismiss Counts II, III and IV of defendant's second amended counterclaim).

Lynch had committed no fraud, no misrepresentation and no violation of the Commodities Exchange Act.

Apppellant first argues that the district court erred in making certain findings of fact and conclusions of law. Appellant specifically challenges the findings that (1) appellant was a "knowledgeable investor," (2) Merrill Lynch extended the margin trading limits of appellant's account to $50,000, (3) appellant prepared the New Account Information form and supplied erroneous financial information to broker Palmen and Merrill Lynch, (4) Palmen made no representations to appellant concerning the safety and stability of the peso as an investment, and (5) Merrill Lynch committed no violation of the *Securities* Exchange Act.

These allegations of error as well as the record indicate that the present case involved many disputed issues of fact. Because this case was tried by the district court, sitting without a jury, our review is somewhat limited. *Fed. Rules Civ. Proc.* 52(a). The findings of the trial court will not be set aside unless clearly erroneous and unsupported by substantial evidence or, if supported by substantial evidence, we are satisfied that a mistake has been made. *E.g., Birdwell v. Hazelwood School Dist.*, 491 F.2d 490, 494 (8th Cir. 1974). In particular we note that "it is not the function of an appellate court to try the case *de novo*, or to pass upon the credibility of witnesses or the weight to be given their testimony. . . ." *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). This is especially true where the case is primarily based upon oral testimony and where the trial judge has had an opportunity to view the demeanor and credibility of the witnesses. *E.g., Snodgrass v. Nelson*, 503 F.2d 94, 96 (8th Cir. 1974).

After a careful review of the evidence, we are unable to agree with appellant. We cannot say that three of the challenged findings of the trial court are clearly erroneous: (1) that

appellant was a "knowledgeable investor," (2) that appellant prepared the New Account Information form and supplied erroneous financial information to broker Palmen and Merrill Lynch, and (3) that Palmen made no representations to appellant about the safety of the peso as an investment. There was evidence that appellant was aware of the circumstances that made the peso more profitable and more speculative an investment and that appellant had already invested a substantial amount in certificates of deposit in Mexican banks. There was also evidence that appellant completed the New Account Information form as part of the forms every new commodities customer is required to complete and that this information was used by the clerical staff of Merrill Lynch in typing the form itself. We also note, without any evaluation of its accuracy, that a credit service report prepared at the request of Merrill Lynch contained information roughly similar to that reported on the form. This finding and the finding about the lack of representations made to appellant are particularly dependent upon the district court's evaluation of the credibility of the witnesses. The parties presented directly contradictory evidence on each of these factual issues. With this observation in mind, we note that the evidence showed appellant approached Palmen with an interest in peso futures (developed from reading unsolicited investment newsletters), appellant discussed the peso with Palmen, Palmen then telephoned Merrill Lynch's foreign currency specialists in Chicago, the specialists noted the peso market was erratic and speculative and expressed "no opinion," and the next day appellant placed his first order to purchase peso futures contracts. Of the two findings that are erroneous, the limit of appellant's margin and the reference to the *Securities* Exchange Act instead of the *Commodities* Exchange Act, neither error in our opinion prejudiced appellant's case.[6]

[6] Appellant accurately challenged the validity of the district court's finding that Merrill Lynch raised the margin trading limit of appellant's account to $50,000. The record indicates that Merrill Lynch at no time raised appellant's trading limit. Merrill Lynch concedes this in its brief. Brief of Appellee at 34. We do not find this error was prejudicial. Count II of appellant's counterclaim alleged a failure on the part of Merrill Lynch to "know your customer" and thus a failure to place appropriate limits on appellant's account. It does appear from the evidence that at one point appellant's account exceeded its margin trading limit by about $7,000. Even assuming, however, that appellant sought to allege a violation of the margin maintenance rules, such a failure in the absence of fraud would not constitute a basis for the imposition of liability upon the broker. *Cf. Carras v. Burns*, 516 F.2d 251 (4th Cir. 1975) (Securities Exchange Act). In *Carras v. Burns* the executors of an estate sued a stockbrokerage firm and two of its employees for losses sustained by the estate's margined securities account, allegedly as a result of the firm's failure to make timely margin calls to maintain the estate's equity. Such a failure violated the stock exchange rules. The court, however, declined to recognize a private cause of action for the breach of the rules alone and in the absence of fraud. *Id.* at 260. The court noted the margin rules had been promulgated primarily to protect the solvency of *brokers* by requiring adequate collateral to finance margin trading by their customers. *Id.* Further, the court observed that violation of the margin rules would perhaps subject the broker to discipline by the exchange but not to liability for loss unless the breach of rules also violated the securities act by operating as a fraud. *Id.*

The other error was the district court's reference to the *Securities* Exchange Act in its second conclusion of law. In our opinion this reference can be characterized as a clerical error and does not indicate the district court misunderstood the nature of appellant's defenses or counterclaims.

Secondly, appellant argues the district court erred in not finding that Palmen submitted the false financial statements to his superiors at Merrill Lynch in violation of the antifraud provisions of the Commodities Exchange Act, 7 U.S.C. § 6b. The information on the form indicated appellant had $500,000 in stocks and commodities, his annual income was approximately $50,000, his estimated net worth was $2 million, and his available risk capital for commodities trading was $100,000. Appellant's actual financial position was considerably below these figures. Appellant argues that Palmen was responsible for supplying the false information and that Palmen, and ultimately Merrill Lynch, was in fact engaged in a scheme to attempt to defraud appellant. Appellant contends the false financial infor-

mation was just one part of this fraudulent scheme intended to involve appellant in an ambitious investing program for which he was unqualified. The district court expressly found that appellant himself supplied this false information. As was true of the other challenged conclusions of the district court, this finding was based to a large extent upon the district court's evaluation of the credibility of the witnesses, to which we defer. We are unable to say the finding of the district court was clearly erroneous.[7]

Finally, appellant argues that the district court erred in dismissing Count III of appellant's counterclaim which alleged Merrill Lynch failed to supervise appellant's account and Palmen's handling of the account, failed to "know your customer" and failed to review appellant's suitability and qualifications as a commodities investor. Appellant argues Merrill Lynch in so doing violated its house rules,[8] stock exchange rules,[9] dealer

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[7] Further, in our opinion, appellant's statutory fraud issue was raised in Count I of the amended counterclaim even though, as appellant argues in his reply brief, it was more explicitly set forth in Count II. In any event, the allegation of statutory fraud was given adequate consideration by the district court and ultimately rejected. The district court memorandum reveals that Count II was dismissed as repetitive of Counts I and III and not for the reason that the district court failed to recognize a private cause of action for violations of the Commodities Exchange Act. Such actions are well recognized. *See Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8 (7th Cir. 1977); *Deaktor v. L. D. Schreiber & Co.*, 479 F.2d 529, 534 (7th Cir.), *rev'd on other grounds sub nom. Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) (citation of cases); *Booth v. Peavey Company Commodity Services*, 430 F.2d 132, 133 (8th Cir. 1970).

[8] Merrill Lynch's house rule 09.12 provides in part:

> As a basic policy, the Corporation [Merrill Lynch] does not wish to handle speculative commodity business for individuals who cannot afford the risks, and for those who are temperamentally not suited to commodity trading. Those who are not willing to take the time to learn what they are doing should be discouraged from trading.

association rules,[10] and good brokerage practice. Appellant argues these violations give rise to a private cause of action. Under the facts of the present case, we must disagree with appellant.

> . . . We do not wish to handle speculative commodity business for individuals with small net worth or small annual income. Neither do we wish to handle business for those individuals regardless of net worth or income whose losses would be detrimental to their general standard of living nor for those whose family responsibilities are such that any loss of capital would impair the financial security of the individual and his dependents.

[9] New York Stock Exchange Rule 405 is popularly known as the "know your customer" rule. It provides in part:

> Every member organization is required through a general partner, a principal executive officer or a person or persons designated under the provisions of Rule 342(b)(1) to
>
> (1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account accepted or carried by such organization and every person holding power of attorney over any account accepted or carried by such organization.
>
> (2) Supervise diligently all accounts handled by registered representatives of the organization.
>
> (3) Specifically approve the opening of an account prior to or promptly after the completion of any transaction for the account of or with a customer, provided, however, that in the case of branch offices, the opening of an account for a customer may be approved by the manager of such branch office but the action of such branch office manager shall within a reasonable time be approved by a general partner, a principal. . . .

[10] National Association of Security Dealers Rule 27 provides in part:

> (a) Each member shall establish, maintain and enforce written procedures which will enable it to supervise properly the activities of each registered representative and associated person to assure compliance with applicable securities laws, rules, regulations and statements of policy promulgated thereunder with the rules of this Association.
>
> . . .
>
> (d) Each member shall review the activities of each office, which shall include the periodic examination of customer accounts to detect and prevent irregularities or abuses and at

We note initially that none of the cases cited by appellant have recognized a private cause of action for alleged violations of a broker's house rules. The question whether a violation of a private stock exchange or trade association rule, required to be promulgated by federal law, such as a rule of the New York Stock Exchange or the National Association of Security Dealers, gives rise to a private cause of action in favor of a customer damaged as a result of the violation is a "troublesome one." *Shull v. Dain, Kalman & Quail, Inc., supra,* 561 F.2d at 160. Most of the cases have answered the question affirmatively *but* with some reservations. *See Avern Trust v. Clarke,* 415 F.2d 1238, 1242 (7th Cir. 1969); *Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 410 F.2d 135, 142 (7th Cir.), *cert. denied,* 396 U.S. 838 (1969); *Evans v. Kerbs & Co.,* 411 F. Supp. 616, 624 (S.D.N.Y. 1976); *cf. Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 181-83 (2d Cir.), *cert. denied,* 385 U.S. 817 (1966) (sets forth test under which to evaluate whether to imply private cause of action from federal regulatory statutes); *see generally* Lowenfels, *Implied Liabilities Based Upon Stock Exchange Rules,* 66 *Colum. L. Rev.* 12 (1966); Note, *Private Rights of Action for Commodity Futures Investors,* 55 *B.U. L. Rev.* 804 (1974). In particular, the courts have typically found no private right of action exists for violation of exchange or dealer association rules in the absence of a

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least an annual inspection of each office and supervisory jurisdiction.

The National Association of Security Dealers Rules of Fair Practice, Article III, § 2, *CCH NASD Manual ¶ 2152, Art. III, § 2,* provides:

> In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

This rule is also referred to as the "know your customer" or suitability rule. *E.g., Architectural League v. Bartos,* 404 F. Supp. 304, 314 (S.D.N.Y. 1975).

finding of fraud. *See, e.g., Shull v. Dain, Kalman & Quail, Inc., supra,* 561 F.2d at 160; *Lincoln Commodity Services v. Meade,* 558 F.2d 469, 474 n.1 (8th Cir. 1977); *Carras v. Burns, supra,* 516 F.2d at 260; *Evans v. Kerbs & Co., supra,* 411 F. Supp at 624; *Architectural League v. Bartos, supra,* 404 F. Supp. at 314.

In the present case the district court should not have dismissed Count III because appellant did state a private cause of action by alleging violations of exchange and dealer association rules accompanied by allegations of fraud. *See Evans v. Kerbs & Co., supra,* 411 F. Supp. at 624 (cases cited therein). As noted above, however, the district court permissibly found that appellant failed to prove fraud on the part of Merrill Lynch. Even if Merrill Lynch had been found to have violated the exchange and/or dealer association rules, such a violation, in the absence of facts establishing fraud, would not constitute an independent basis for liability. *See, e.g., Lincoln Commodity Services v. Meade, supra,* 558 F.2d at 474 n.1. Therefore, we conclude in this case that the district court committed no reversible error in dismissing Count III.

The judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

United States Court of Appeals
For the Eighth Circuit

No. 78-1622

United States, ex rel. Sam Goldman,
Petitioner-Appellant,
v.
The Honorable James H. Meredith, Chief Judge,
The Honorable John F. Nangle, Judge,
W. H. Blumenthal, Secretary of the Treasury,
Respondents,
Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Appellee.

Petition for Writ of Mandamus and/or Prohibition and Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 17, 1978
Filed: April 24, 1979

Before STEPHENSON and McMILLIAN, Circuit Judges, and ROBINSON,* Senior District Judge.

McMILLIAN, Circuit Judge.

* The Honorable Richard E. Robinson, United States Senior District Judge for the District of Nebraska, sitting by designation.

This case concerns the validity of several orders entered by the district court[1] in supplementary post-judgment proceedings to enforce its judgment. It also raises a question that appears to be one of first impression, that is, whether book-entry Treasury bills are subject to garnishment proceedings.

In the underlying litigation appellee, Merrill Lynch, Pierce, Fenner & Smith, Inc. (hereinafter Merrill Lynch), sued appellant, Sam Goldman (hereinafter petitioner), to recover a deficiency of $119,145.00 in petitioner's commodities margin trading account. After a bench trial, judgment was entered in favor of Merrill Lynch for the amount of the deficiency plus interest and costs.[2] Petitioner filed a notice of appeal but did not post a supersedeas bond. Therefore, Merrill Lynch proceeded to execute upon petitioner's property to satisfy its judgment; however, the execution was returned unsatisfied.

Merrill Lynch then instituted supplementary post-judgment proceedings[3] which included the submission of written interrogatories and a judgment debtor examination. These proceedings disclosed that petitioner's property consisted of two apartment buildings in Clayton, Missouri, substantial savings and checking accounts at local banks, and some U.S. Treasury bills. Petitioner further revealed that he had disposed of most of this property[4] in January and February of 1978, before the trial,

[1] The Honorable James H. Meredith, Chief Judge, United States District Court for the Eastern District of Missouri (orders of July 31 and August 25, 1978); the Honorable John F. Nangle, United States District Judge for the Eastern District of Missouri (order of August 18, 1978).

[2] The judgment was recently affirmed by this court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman*, No. 78-1427 (8th Cir. Mar. 14, 1979), *aff'g* 451 F. Supp. 223 (E.D. Mo. 1978).

[3] F. R. Civ. Pro. 69(a); V.A.M.R. 90.02 *et seq.*

[4] Petitioner gave one of his two apartment buildings to a woman friend and sold the other building in February of 1978. Petitioner does have several hundred dollars in local bank deposits which could be reached by execution.

and had used the proceeds to purchase book-entry Treasury bills. Petitioner invested approximately $205,000 in book-entry Treasury bills.

In light of this information, Merrill Lynch attempted to register the judgment in the United States District Court for the District of Columbia,[5] pursuant to 28 U.S.C. § 1963.[6] The clerk of the court refused to register the judgment because it was not "final by appeal." *See Abegglen v. Burnham*, 94 F. Supp. 484, 486 (D. Utah 1950) (holding a judgment of a district court does not become "final by appeal" within the meaning of the statute providing for registration of such judgments in another district until the case has been disposed of by appeal); *accord, Stanford v. Utley*, 341 F.2d 265 (8th Cir. 1965); *Lipton v. Schmertz*, 68 F.R.D. 249 (S.D.N.Y. 1974).

Merrill Lynch next caused a writ of garnishment to be issued to the Federal Reserve Bank in St. Louis, Missouri. It was returned unsatisfied for the reason that the Federal Reserve Bank held neither petitioner's book-entry Treasury bills account nor any evidence of indebtedness belonging to petitioner. Confronted with the prospect that petitioner's assets could not be reached through garnishment proceedings, Merrill Lynch sought equitable relief in the district court on July 12, 1978, by filing an application for a temporary restraining order, a preliminary injunction and a mandatory injunction. On the same day, the district court issued its order to show cause and

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[5] Petitioner's book-entry Treasury bills are held in an account maintained by the Treasury in Washington, D.C. *See* 31 C.F.R. § 350.7(a) (1978).

[6] 28 U.S.C. § 1963 provides in part (emphasis added):

> A judgment in an action for the recovery of money or property now or hereafter entered in any district court *which has become final by appeal or by expiration of time for appeal* may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

a temporary restraining order prohibiting petitioner from transferring or cashing out his interest in the book-entry Treasury bills to the extent of $131,655.22 (judgment plus interest and costs at that date). A preliminary hearing was set for July 21, 1978.

After the preliminary hearing at which the parties stipulated to most of the facts at issue, the district court entered its order on July 31, 1978, granting a preliminary injunction and further ordering petitioner to cash sufficient book-entry Treasury bills to satisfy the outstanding judgment. The latter part of the order was stayed pending disposition of the appeal.

Prior to the issuance of the preliminary and mandatory injunctions, Merrill Lynch had caused a writ of execution and summons to be issued to the Department of the Treasury (hereinafter the Treasury) on July 18, 1978. The answer of the Treasury disclosed that, as of the date of service, it held two book-entry Treasury bills in petitioner's account (total value of $170,000) and had marked the account so petitioner could not withdraw them without prior authorization. The answer further stated that because book-entry Treasury bills were not represented by a definitive security in the form of an engraved certificate, the bills would have to be transferred through the Federal Reserve Bank communication system into a book-entry account maintained by or through a member bank in the Federal Reserve System before they could be subject to execution and sale.

Thereafter, on August 18, 1978, the district court ordered the U.S. Marshal to seize petitioner's book-entry Treasury bills, to transfer them through the Federal Reserve Bank System, and to sell them in satisfaction of the judgment. On August 25, 1978, the district court further ordered the Treasury bills to be sold through a Federal Reserve Member bank, at the market price, and without prior public notice.

Three days later, on August 28, 1978, petitioner filed a petition for a writ of mandamus or alternatively for a writ of prohibition, challenging the validity of the district court orders and the recognition of such orders by the Treasury. Petitioner sought to have the orders set aside and to have the Treasury prohibited from transferring the book-entry Treasury bills without petitioner's consent.

On September 5, 1978, this court ordered the above orders of the district court stayed pending the appeal and hearing on the petition for mandamus. We further ordered petitioner not to cash, transfer, or in any way alter the status of his book-entry Treasury bills in the amount of $130,000.00 pending the final judgment of the court in this matter.

As a basis for relief petitioner argued that (1) the district court did not have jurisdiction to grant equitable relief, (2) the district court erred in granting the preliminary and permanent injunctions, and (3) the Treasury violated its own regulations by restrictively marking petitioner's book-entry Treasury bills. For the reasons discussed below we are unable to agree with petitioner and therefore deny the petition for writ of mandamus or in the alternative for writ of prohibition.

First, petitioner argues that the district court exceeded its jurisdiction in granting Merrill Lynch injunctive relief. Petitioner argues that Merrill Lynch sought equitable relief in the form of a "creditor's bill" and that such relief is not available under Missouri law. We disagree. F. R. Civ. P. 69(a) provides in part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

Thus, in the absence of a controlling federal statute, the district court has the same authority to aid judgment creditors in supplementary proceedings as that which is provided to state courts under local law. *E.g., North Pacific Steamship Co. v. Pyramid Bulkcarriers, Inc.*, 515 F.2d 426 (5th Cir. 1975); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1975); *Nelson v. Maiden*, 402 F. Supp. 1307 (E.D. Tenn. 1975); *Douglass v. First National Realty Corp.*, 351 F. Supp. 1142 (D.D.C. 1972).

Our review of Missouri law persuades us that equitable relief in the form of a creditor's bill is an available creditor's remedy, under the appropriate circumstances. *E.g., Buckley v. Maupin*, 344 Mo. 193, 125 S.W.2d 820 (1939); *O'Connell v. Smith*, 131 S.W.2d 730 (Mo. Ct. App. 1939); *State ex rel. Busby v. Cowan*, 232 Mo. App. 391, 107 S.W.2d 805 (1937); *cf. Haase v. Chapman*, 308 F. Supp. 399 (W.D. Mo. 1969) (appointment of receiver). In general, a creditor's bill is considered the equitable equivalent of garnishment or execution and comparable to proceedings supplementary to and in aid of execution. *See Pierce v. United States*, 255 U.S. 398, 40'-02 (1921); *State ex rel. Busby v. Cowan, supra*, 107 S.W.2d at 807. By the means of a creditor's bill, a judgment creditor seeks to satisfy his judgment from property of the judgment debtor which is not subject to execution. Such relief is thus appropriate only upon a showing by the judgment creditor that he has no adequate legal remedy. *See O'Connell v. Smith, supra*, 131 S.W. 2d at 733. Missouri case law indicates that this type of equitable relief is within the general equitable jurisdiction of Missouri state courts and further that it is a remedy "as comprehensive in scope and purpose as the remedy provided by the statutory enactments in other states." *Geist v. City of St. Louis*, 156 Mo. 643, 57 S.W. 766, 767 (1900).

We also find the cases cited by petitioner, *First National Bank of Boston v. Santisteban*, 285 F.2d 855 (1st Cir. 1961), and *Nelson v. Maiden, supra*, to be distinguishable because in each case the local law did not provide for the type of relief sought in supplementary proceedings for the enforcement of judgments. As noted above, our reading of Missouri law indicates that a creditor's bill is, by judicial construction, one of the available supplementary proceedings in aid of execution in Missouri. We read *State ex rel. Busby v. Cowan* to support our analysis of the availability of a creditor's bill as a judgment creditor's remedy. The court in *State ex rel. Busby v. Cowan* recognized that a creditor's bill was a proper remedy but was forced to reject it in the case before it because a state statute expressly prohibited garnishment proceedings against municipal corporations. 107 S.W.2d at 807. Apart from the Treasury regulations, discussed further below, we are not confronted with a similar prohibition in the present case.

Petitioner next challenges the district court's granting of injunctive relief. He argues that the district court improperly reached the merits of the case by granting the permanent injunction after the preliminary hearing without expressly ordering consolidation and without giving the parties adequate notice. *See* F. R. Civ. Pro. 65(a)(2). Ordinarily, it is improper to dispose of a case on the merits after the preliminary hearing; "[t]here are certain circumstances, however, in which a final adjudication after a hearing on a preliminary injunction is appropriate even without formal consolidation." 11 C. Wright & A. Miller, Federal Practice and Procedure § 2950, p. 490 (1973). For example, disposition on the merits may be appropriate whenever the evidence presented at the preliminary hearing indicates that there is no conflict of material fact that would justify holding the full trial on the merits. *E.g., Bright v. Nunn*, 448 F.2d 245, 247 n.1 (6th Cir. 1971) (determinative facts uncontested); *Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 70 (2d Cir.), *cert. denied*, 385 U.S. 971

(1966) (no triable issue of fact). *But see Progress Development Corp. v. Mitchell*, 286 F.2d 222, 234 (7th Cir. 1961) (absence of material fact issue at preliminary hearing does not justify reaching the merits); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2950, p. 492 (1973).

We do not find the *de facto* consolidation of the preliminary hearing and the trial on the merits to have been improper in the present case. We note that most of the facts were stipulated by the parties. The only disputed question, whether the book-entry Treasury bills purchased by petitioner were subject to garnishment, is one of law and remains contested at this proceeding. Moreover, petitioner continues to urge that the book-entry Treasury bills are not subject to garnishment, a position which can only support the conclusion of the district court that Merrill Lynch had no adequate remedy at law. In our view there was no conflict of material fact which justified the holding of a full trial on the merits. We note, however, that it is certainly preferable to expressly order consolidation after giving adequate notice to the parties. *See, e.g., Pughsley v. 3750 Lake Shore Drive Cooperative Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972).

Petitioner also argues that the district court erred in granting injunctive relief because Merrill Lynch failed to establish a reasonable probability of irreparable injury or a substantial probability of success on the merits. Petitioner argues again that this type of equitable relief is not an available form of supplementary relief in Missouri. As discussed above, our reading of Missouri case law is to the contrary. Petitioner further argues that Merrill Lynch failed to show a reasonable probability of irreparable injury because there was no evidence petitioner had made any fraudulent conveyances, threatened to free the jurisdiction, made himself insolvent or committed any other action to defraud his creditors. Missouri case law indicates, however, that the return of a writ of execution unsatisfied has

been held to establish prima facie, if not conclusively, that the judgment creditor has exhaused his legal remedies and may maintain an action for equitable relief. *E.g., Steele v. Reid*, 284 Mo. 269, 223 S.W. 881 (1920); *O'Connell v. Smith, supra*, 131 S.W.2d 730.

We note that Merrill Lynch argues that the issue of the propriety of injunctive relief is moot and should be dismissed because, subsequent to the order of July 31, 1978, the Treasury affirmatively responded to the writ of execution issued by the district court[7] and restrictively marked petitioner's book-entry account. Therefore, Merrill Lynch argues that the book-entry Treasury bills may be reached by writ of execution and no equitable relief is necessary. This argument raises petitioner's final point: whether the Treasury acted in violation of its own regulations by accepting the writ of execution and restrictively marking petitioner's book-entry account. Petitioner argues the action of the Treasury violated 31 C.F.R. § 350.16(b), which provides: "The Treasury will not under any conditions accept notices of pending judicial proceedings, or of judgments in favor of creditors or others, or of any claims whatsoever, for the purpose of suspending or modifying any book-entry account or any transaction in book-entry Treasury bills." It is petitioner's position that this regulation, in effect, shields book-entry accounts from judicial process. We cannot accept this position.

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[7] Although the Treasury has evidently waived any objection to the issuance of process in the present case and has consented to follow the orders of the district court and this court in this matter, *see* Brief of Respondent W. H. Blumenthal, Secretary of the Treasury, at 7, we raise a question about the validity of such process. In our opinion, the district court sitting in Missouri, did not have the jurisdiction to issue a writ of execution in favor of a private party to the Treasury in Washington, D.C. *See* F. R. Civ. Pro. 4(f); V.A.M.R. 76.06; *Globe Indemnity Co. v. Roe*, 37 F. Supp. 761, 762 (S.D.N.Y. 1941); 12 C. Wright & A. Miller, Federal Practice and Procedure § 3013, p. 70 (1973); *compare* 28 U.S.C. § 2413 (executions in favor of the United States may be executed anywhere in the United States).

In the absence of an express directive, we will not create a sanctuary for judgment debtors. We do not read 31 C.F.R. § 350.16(b) to insulate petitioner's book-entry account from judicial process. In our opinion, 31 C.F.R. § 350.16(b) must be read with the general regulations governing United States securities, especially those regulations concerning transfer of United States securities through judicial proceedings. *See* 31 C.F.R. §§ 306.0, 306.100, 306.101. These regulations provide that "[t]he Treasury will recognize valid judicial proceedings affecting the ownership of or interest in transferable securities, upon presentation of the securities together with evidence of the proceedings." 31 C.F.R. § 306.100. The evidence necessary is described in 31 C.F.R. § 306.101: "copies of a final[8] judgment, decree, or order of court and of any necessary supplementary proceedings must be submitted." These regulations demonstrate that the Treasury will recognize judicial process, given the appropriate evidence.

Frankly, we are somewhat perplexed by the language used in 31 C.F.R. § 350.16(b). At first glance, this regulation does appear to provide petitioner with his sought-after sanctuary. We believe, however, it is wiser to construe this regulation so as to effect an accommodation with the general regulations discussed above. We read 31 C.F.R. § 350.16(b) to prohibit the Treasury only from accepting *notices* of pending judicial proceedings, *notices* of judgments in favor of creditors or others, or *notices* of any claim.[9] By this construction, we believe the

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[8] Presumably "final judgment" here refers to "one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233 (1945), and not final by appeal or by expiration of time for appeal.

[9] Petitioner argues that under Missouri practice and procedure a "notice of garnishment" is necessary to confer jurisdiction over the property garnished, *see Meyer v. Meyer*, 571 S.W.2d 477 (Mo.App. 1978); *Fulkerson v. Laird*, 421 S.W.2d 523 (Mo. App. 1967), and therefore falls within the prohibition in 31 C.F.R. § 350.16(b)

Treasury can, without violating 31 C.F.R. § 350.16(b), recognize valid judicial proceedings, specifically writs of execution. We also read the regulations to permit the Treasury to recognize evidence of valid judicial proceedings other than writs of execution, that is, final judgments, decrees or orders of court and any necessary supplementary proceedings authenticated and certified under court seal. *See* 31 C.F.R. § 306.101. We do not believe, however, that the Treasury should recognize letters or other communications unsupported by authenticated copies of final judgments or supplementary proceedings.

Ordinarily, supplementary proceedings in aid of execution would not present such difficulties. We believe, however, that the unique character of this new form of government security deserves further discussion. Book-entry Treasury bills are issued in the form of an entry on the records of a Federal Reserve bank or the Treasury; there is no engraved certificate or other tangible evidence, only the account entry itself. A depositor receives only confirmation (in the form of an "advice") of transactions in his book-entry account. By eliminating securities in the form of engraved certificates, the Treasury sought to protect against losses due to theft, mishandling and counterfeiting; to reduce costs of issuing, storing and delivering securities in physical form; and to ease the burden of paperwork created by the growing volume of public debt transactions. 41 Fed. Reg. (Treasury Department Circular, Public Debt Service 26-76, Dec. 6, 1976). Book-entry Treasury bills in definitive form as engraved certificates were issued for a limited period of time (until December 31, 1978), in denominations of $100,-

against the acceptance of "notices." We think petitioner is reading the unacceptable "notices" referred to in 31 C.F.R. § 350.16(b) too narrowly. In order to accommodate the Treasury's recognition of proper evidence of valid judicial proceedings in 31 C.F.R. § 306.100, we read "notices" to refer to some communication other than any necessary supplementary proceedings, 31 C.F.R. § 306.101, for example, a letter referring to a judgment instead of a certified copy of the judgment.

000, and only to "eligible entities" required by law to hold definitive securities. *See* 31 C.F.R. § 350.17.

It is apparent from the above discussion that book-entry Treasury bills represent a new form of government security that is, by design, intangible. In our opinion, this intangible nature necessitates the injunctive relief granted in the present case, despite the recognition by the Treasury of valid legal proceedings as discussed above. This is because there is simply nothing capable of being physically executed upon and then transferred. In its answer to the interrogatories (Exhibit B), the Treasury indicated the book-entry Treasury bills would first have to be transferred through the Federal Reserve bank communications system into a book-entry account maintained by or through a member bank in the Federal Reserve Bank System and then sold. On the basis of this information, the district court authorized the U.S. Marshal to make a certified request on behalf of petitioner to transfer the book-entry Treasury bills through the Federal Reserve bank communications system and to effect the execution sale in satisfaction of the judgment. In view of the fact that the book-entry Treasury bills at issue are now mature (and overdue), *see* 31 C.F.R. § 306.25(b), petitioner, or, if necessary, the U.S. Marshal, authorized to act on petitioner's behalf, now has only to transfer the book-entry Treasury bills by certified request,[10] redeem them, and apply the proceeds in satisfaction of the judgment.

In sum, we find that (1) equitable relief in the form of a creditor's bill is available, under the appropriate circumstances, to a judgment creditor under Missouri law in supplementary

[10] We are unsure whether a certified request made by or on behalf of the depositor is a prerequisite to transfer the book-entry Treasury bills. If it is not, then we see no difficulty with the Treasury transferring the book-entry Treasury bills, without a certified request by or on behalf of the depositor, upon presentation of certified copies of a final judgment, decree or order and any necessary supplementary proceedings or pursuant to other valid judicial proceedings (i.e., a writ of execution).

proceedings in aid of execution; (2) the Treasury is not prohibited from recognizing valid judicial proceedings affecting ownership of or interest in book-entry Treasury bills upon presentation of the necessary evidence;[11] and (3) even though the

[11] We do not read the regulations to restrict "valid judicial proceedings" to enforcement of the judgment by writ of execution. Treasury will recognize valid judicial proceedings, the unique nature of book-entry Treasury bills and the necessity of transfer through the Federal Reserve bank communications system, by a certified request made by or on behalf of the depositor, makes injunctive relief necessary.

Accordingly, the petition for writ of mandamus or in the alternative for writ of prohibition is denied. Because the book-entry Treasury bills at issue are now mature, and in fact overdue, we remand to the district court with directions to modify its orders and to direct petitioner to make a certified request to transfer his book-entry Treasury bills within 10 days, to redeem them and to apply the proceeds to satisfy the outstanding judgment, or, if petitioner fails to make a certified request to transfer within 10 days, to authorize the U.S. Marshal to do so on petitioner's behalf.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

United States District Court
Eastern District of Missouri
Eastern Division

Merrill Lynch, Pierce, Fenner & Smith, Inc., a Corporation,
Plaintiff,
vs.
Sam Goldman,
Defendant.
No. 76-852 C (1)

ORDER

A memorandum dated this date is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that plaintiff's motion to dismiss Counts II, III, and IV of defendant's second amended counterclaim be and is granted.

IT IS FURTHER ORDERED that Counts II, III, and IV of defendant's second amended counterclaim be and are dismissed.

Dated this 29th day of December, 1977.

/s/ J. H. MEREDITH
United States District Judge

MEMORANDUM

(Filed December 29, 1977)

This matter is before the Court on the motion of plaintiff Merrill Lynch, Pierce, Fenner & Smith, Inc., to dismiss for failure to state a claim upon which relief can be granted. For the following reasons, plaintiff's motion will be sustained.

This litigation arose as the result of losses incurred in the trading of Mexican peso futures contracts. Plaintiff is a registered commodity broker who handled the purchase for defendant. Between May 1976 and July 1976, defendant placed five futures contracts orders with plaintiff. All were consummated by plaintiff on the International Monetary Market of the Chicago Mercantile Exchange. The contracts were agreements to purchase one million pesos on the maturity date for a given price.

On or about August 31, 1976, the Mexican government announced it would no longer support the peso at the fixed parity price of eight cents per peso, and instead decided to allow it to float at market value. As a result, the Mexican peso decreased in value with reference to the dollar and the International Monetary Market subsequently increased margin requirements to $25,000 per contract. On September 2, 1976, plaintiff gave notice to the defendant to deposit $125,000 to meet the new margin requirements. Because the defendant failed to do so, plaintiff sold defendant's five contracts, pursuant to the Commodity Account Agreement. Defendant lost over $119,000 in the exchange. Defendant refused to tender this amount to plaintiff in satisfaction of the loss incurred in the transaction. Accordingly, plaintiff filed its complaint for $119,145.00 on September 21, 1976.

In response thereto, defendant filed a counterclaim in four counts. Plaintiff has responded with a motion to dismiss or strike

Counts II, III, and IV for failure to state a claim upon which relief can be granted, or as irrelevant, immaterial, and prejudicial under Rule 12(f).

Count I of defendant's counterclaim alleges that plaintiff defrauded defendant by misrepresenting the soundness of investing in peso futures and by doing so violated the Commodities Exchange Act, 7 U.S.C. § 6b and 6o. Defendant seeks an award of damages in the sum of $12,000 to cover his loss of his initial investment and further prays for punitive damages.

Count II adopts all of Count I and further states that plaintiff's actions were "wrongful" in that the inducements made by plaintiff were fraudulently made to convince defendant to deal with plaintiff on a larger scale; plaintiff failed to disclose the risk involved; and plaintiff caused excessive credit to be extended to defendant, all of which violated plaintiff's house rules, and the broker/client relationship.

Count III alleges that plaintiff had a duty to review and supervise defendant's account and his credit, but that it breached such duty. Defendant seeks damages for plaintiff's failure to follow its house rules and regulations and failure to use "due diligence" in supervising defendant's account.

Count IV claims that plaintiff had inside information which it disclosed to selected customers in reckless disregard of defendant's welfare.

The Court is of the opinion that Count III should be dismissed because these house regulations are for the sole benefit of Merrill Lynch and do not give rise to a private cause of action. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178 (2d Cir. 1966). Relevant language therein states:

> ". . . whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a

member cannot be determined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion that when the violation is of the statute or an SEC regulation." Id. at 182.

In *Colonial* and related cases, the courts were dealing with purported violations of Rule 405 of the New York Stock Exchange. Count III alleges that plaintiff breached its duty of due diligence as required by Merrill Lynch, Rule 05.32. There is no private right of action afforded by the purported failure of plaintiff to follow its own rules. These rules were not drafted for the benefit of the public, but rather for the protection of dealers. The brokerage firm is concerned primarily with discouraging and eliminating actions by its representatives which might give rise to legal liability. *Colonial*, supra; *Carras v. Burns*, 516 F. 2d 251 (4th Cir. 1975); *Nelson v. Hench*, 428 F.Supp. 411 (D. Minn. 1977).

Count II states as a cause of action that plaintiff's representations were part of a scheme to get defendant to make larger investments and that such representations were wrongful in that plaintiff falsely represented the safety of the peso, failed to advise defendant of the risk of commodities trading, and that excessive credit was extended to defendant causing him to lose his investment. Defendant in paragraph 24 further alleges these actions violated the house rules of plaintiff, wherein he states: "such activities violated its own house rules, . . . as set forth in greater detail in Count III herein."

This count merely repeats and reiterates in different language the allegations of Counts I and III. Paragraph 9 of Count I alleges that plaintiff represented there was no risk to defendant's investment capital and that the peso was a safe investment.

Count III contained the specific allegations of violations of house rules. As stated above, the purported breach of such rules or regulations affords no right of action in this case. In the cases cited by defendant, the rules upon which a party was allowed to sue were, at least, exchange or association rules and not merely internal guidelines. Accordingly, Count II will be dismissed.

Count IV alleges that plaintiff had inside information which it disseminated to selected customers. Defendant claims this disclosure was in reckless disregard of its financial welfare. This count will also be dismissed. A "broker has no duty to relay news of political, economic, weather, or price changes to his principal, absent an express contract to furnish such information." *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 337 F.Supp. 107, 112, (N.D. Ala. 1971), aff'd 453 F.2d 417 (5th Cir. 1972); *Carras v. Burns*, supra. Although *Robinson* appears to revole on negligent failure to furnish information, had the defendant in this cause intended to plead fraud in the fourth count, the count would still be repetitious of Count I. Accordingly, Count IV will be dismissed.

Dated this 29th day of December, 1977.

/s/ J. H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Merrill Lynch, Pierce, Fenner & Smith, Inc., a Corporation,
Plaintiff,
v.
Sam Goldman,
Defendant.
No. 76-852 C (1)

JUDGMENT

(Filed May 8, 1978)

Findings of fact and conclusions of law dated this day are hereby incorporated into and made a part of this judgment.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff, Merrill Lynch, Pierce, Fenner & Smith, Inc., have judgment against the defendant, Sam Goldman, on the complaint in the amount of $119,145.00, plus interest at the rate of six percent per annum from September 9, 1976.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the plaintiff, Merrill Lynch, Pierce, Fenner & Smith, Inc., have judgment against the defendant, Sam Goldman, on the defendant's counterclaim and the defendant's counterclaim is dismissed with prejudice. Costs are assessed against the defendant.

Dated this 8th day of May, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 8, 1978)

This matter was tried to the Court and the Court makes the following findings of fact and conclusions of law.

Findings of Fact

1. Merrill Lynch, Pierce, Fenner & Smith, Inc., (Merrill Lynch), is a Delaware corporation, with its principal place of business in New York City, and licensed to do business in the State of Missouri. It is engaged in the business as a securities and commodities broker. Sam Goldman is a citizen of the State of Missouri. The amount in controversy exceeds $10,000. Jurisdiction diversity is alleged in the complaint. The counterclaim jurisdiction is based on the Commodities Exchange Act, 7 U.S.C. § 6b and 6o, the essence of which is that the plaintiff defrauded the defendant.

2. On or about May 4, 1976, defendant Sam Goldman went to the offices of Merrill Lynch in Clayton, Missouri, to inquire about investing in Mexican Peso Futures Contracts. He discussed this matter with Stephen Palmen, an account executive in the office. Mr. Palmen had no information about Mexican pesos and had never traded in Mexican Peso Futures. He so advised Mr. Goldman. Goldman brought with him to the office a copy of "McKeever's Multi-National Investment and Survival Letter" of March 9, 1976, which Palmen had never seen. This "Letter" discussed the large returns that could be made by investing in Mexican Peso Futures Contracts. Goldman left the Letter with Palmen. Palmen stated he would look into the matter.

3. The McKeever Letter listed two telephone numbers for Dick Joynes, president of Futures Investment Company, in Cali-

fornia. In Goldman's presence, on May 4, 1976, Palmen called these two numbers and talked to someone who refused to provide any information concerning investment in the peso, unless Palmen subscribed to their advisory service, which Palmen declined to do.

4. At Goldman's request, Palmen requested an opinion from Merrill Lynch's foreign currency specialists in Chicago. These two specialists of Merrill Lynch were Chuck Dushek and Tully Davia. The specialists' opinion sent to Palmen by teletype was that the Mexican peso market was very erratic and speculative and made no recommendation and had no opinion on whether a client should get in or out of this market. The information was related by Palmen to Goldman by telephone on May 4, 1976.

5. Goldman was a lawyer and had practiced law in the St. Louis area for thirty years. At the time he first came to the office of Merrill Lynch, he had $120,000 invested in Mexican Savings and Loan Association certificates of deposit. This investment was made in 1972 and he had been earning ten or eleven percent interest since that time, which was a higher rate than was available on certificates of deposit in the United States. Goldman was a knowledgeable investor and was fully aware of the risk involved in trading in Mexican Peso Futures Contracts. At the time Goldman first came to the office of Merrill Lynch, the peso was tied to a fixed rate of exchange of twelve and one-half pesos to the dollar, with one peso being worth eight cents.

6. The next day, May 5, 1976, Goldman returned to the office of Merrill Lynch and brought with him the New Account Information for Commodities Speculative Accounts card. Goldman indicated on this form that he had $500,000 in current stocks and commodities and that his net worth with two million dollars. He signed the necessary contracts required by the International Monetary Market of the Chicago Mercantile Exchange, of which Merrill Lynch is a member. He made a deposit of $7,000 with Merrill Lynch, which was later increased to $12,000.

7. The following futures contract orders to purchase pesos were made by Goldman for his account with Merrill Lynch.

Date of Order	No. of Pesos	Contract Price Per Peso	Maturity Date of Contract
5- 6-76	1 million	.06883	Dec. 14, 1976
5-12-76	1 million	.06885	Dec. 14, 1976
6-18-76	1 million	.07675	Sept. 14, 1976
7- 2-76	1 million	.07784	Sept. 14, 1976
8-11-76	1 million	.07765	Dec. 14, 1976

8. Merrill Lynch placed a $50,000 maximum margin requirement on the Goldman account, based on the information provided in the New Account Information form provided by Goldman. The rule of thumb of Merrill Lynch was that a commodities trading account should be no more than ten percent of the customer's net worth figure. The $50,000 limit was a conservative figure, based on the information which Goldman had supplied to Merrill Lynch. At Merrill Lynch's request, a Hopper-Holmes credit check was run on Goldman, which indicated that his net worth was $470,000. This report was dated May 28, 1977.

9. On May 4, 1976, when Goldman first came to the office of Merrill Lynch, Palmen made an effort to interest Goldman in a $50,000 guided investment program. Under Merrill Lynch's guided investment program, the client would deposit $50,000 and the brokerage house would buy and sell various stocks, bonds, and other investments. During the entire time that Goldman did business with Merrill Lynch, Palmen made an effort to sell this program to Goldman. Goldman was not interested in the program, but only in Mexican pesos.

10. In June of 1976, Goldman went to the Clayton Brokerage Company and called on Don Becker, a commodities broker. Goldman advised that he was interested in buying four or five peso futures contracts with the December 1977 maturity date. Becker told Goldman that the margin requirement would be $35,000. Goldman advised Becker that when the peso contracts reached a certain point to call him and he would buy some Mexican Peso Futures Contracts. Becker advised Goldman that futures contracts in pesos was a very risky place to be and that there had been a great deal of talk and rumor of devaluation of the peso.

11. On August 19, 1976, Goldman purchased through Don Becker, a December 1977 Peso Futures Contract. Goldman had previously discussed this matter with Palmen at Merrill Lynch and Palmen recommended he not buy the contract, because of the uncertainty of devaluation of the Mexican peso. Goldman sold the December 1977 Mexican Futures Contract on August 25, 1976, and made a profit of $935.00. During the month of August 1976, Goldman deposited $20,000 with the Clayton Brokerage Company to be used for trading in other commodities futures. He continued to trade with Clayton Brokerage in other futures commodities during the month of September 1976.

12. On May 12, 1976, Palmen obtained a McKeever report, dated May 4, 1976. The McKeever report stated that "rumors of devaluation are louder than ever" and that conservative investors should "stand aside . . . until we see what is going to happen." This report was sent by Palmen to Goldman. On May 21, 1976, Palmen observed an article in the "Wall Street Journal", of that date, which stated that the Mexican economy had serious problems and that American investors were concerned over devaluation of the peso. Palmen sent this article to Goldman. Goldman read the article.

13. On August 22, 1976, Goldman could have sold his Mexican Peso Futures Contracts and realized a profit of $22,-

580. This he did not do. On August 31, 1976, the Government of Mexico announced that the peso would no longer be traded at a fixed rate of exchange with reference to the American dollar, but would be allowed to float free at such rate of exchange as the open market would determine. The Commodities Exchange closed for one week because of this announcement. On September 2, 1976, Merrill Lynch called upon Goldman to deposit an additional $125,000 margin, which he declined to do. Merrill Lynch, on September 8, 1976, pursuant to the Commodities Account Agreement signed by Goldman with them, sold Goldman's Peso Contracts at a loss to Merrill Lynch of $131,145, which Merrill Lynch paid. Deducting the $12,000 deposit which Goldman had with Merrill Lynch, Goldman is indebted to Merrill Lynch in the amount of $119,145, together with interest at the rate of six percent per annum from September 9, 1976.

14. Goldman's testimony of his dealings with Palmen is very different from the facts found by the Court.

Conclusions of Law

1. This Court has jurisdiction by virtue of diversity of citizenship, 28 U.S.C. § 1332, and the Commodities Exchange Act, 7 U.S.C. § 6b and 6o.

2. The outcome of this case is determined to some extent by the credibility of the witnesses. When the Court considers the conduct of Goldman, his prior investment in Mexican pesos, the physical evidence of warnings given by Palmen to Goldman, which he admits receiving, the Court finds the plaintiff committed no fraud, no misrepresentation and no violation of the Securities Exchange Act.

3. Judgment will be rendered for the plaintiff, Merrill Lynch, and against the defendant, Goldman, on the complaint in the sum of $119,145, plus interest in the amount of six percent per

annum from September 9, 1976. Judgment will be rendered against the defendant, Sam Goldman, on his counterclaim and in favor of the plaintiff, Merrill Lynch. The counterclaim will be dismissed with prejudice.

Dated this 8th day of May, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

United States District Court
Eastern District of Missouri
Eastern Division

Merrill Lynch, Pierce, Fenner & Smith, Inc.,
Plaintiff,
vs.
Sam Goldman,
Defendant.
No. 76-852 C (1)

ORDER

(Filed July 31, 1978)

A memorandum dated this day is hereby incorporated in and made a part of this order.

IT IS HEREBY ORDERED that the motion of plaintiff for a preliminary injunction be and is granted.

IT IS FURTHER ORDERED that defendant cash treasury bills, notes or obligations owned by him in the sum of $130,-

000.00 to satisfy the judgment, costs and interest against him in this case. This order is hereby stayed pending the disposition of the appeal in this case. Pending the final order of the Court of Appeals, the defendant shall immediately deposit with the clerk of this Court the receipts for treasury bills in the sum of $130,000.00. Pending the final order of the Court of Appeals, the defendant, Sam Goldman, is hereby ORDERED not to cash, transfer or in any way effect the status of treasury bills, notes or obligations owned by him in the sum of $130,-000.00.

Dated this 31st day of July, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

MEMORANDUM

(Filed July 31, 1978)

This matter is before the Court on the motion of plaintiff for a temporary injunction. For the reasons stated below, plaintiff's motion will be granted and an injunction issued.

This cause was earlier tried to the court. Plaintiff sued defendant for losses it incurred in trading futures contracts in his behalf. Defendant counterclaimed for fraud.

On May 8, 1978, the Court entered judgment in plaintiff's favor for $119,145.00 plus interest on its claim against defendant. It further granted judgment to plaintiff on defendant's counterclaim.

On June 6, 1978, defendant filed his notice of appeal. He did not, however, file a supersedeas bond.

"When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay [of proceedings to enforce a judgment] . . ." Rule 62(d), F.R.C.P. If no bond is filed the status quo is not preserved and the judgment creditor may proceed to satisfy the judgment.

Because no bond was filed, plaintiff proceeded to examine the assets of defendant. It was discovered that defendant deeded by gift a valuable parcel of property to a girlfriend. Plaintiff also discovered that defendant withdrew most of his money in his savings accounts and purchased four book entry treasury bills in lots of $120,000, $50,000, $25,000 and $10,000.

Plaintiff then tried to register its judgment in the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1963. The clerk, however, refused to accept and register it stating that it was not "final" within the meaning of Section 1963. *Abegglen v. Burnham*, 94 F. Supp. 484 (C.D. Utah 1950).

The plaintiff then issued a writ of garnishment to the Federal Reserve Bank of St. Louis. The bank, through its attorneys, stated that book entry treasury bills cannot be garnished or otherwise reached because the bank neither holds such treasury bills nor any evidence of indebtedness of the United States Government.

Plaintiff next alleges that 31 C.F.R. § 350.16 states that the U. S. Treasury will not honor or comply with a garnishment or other court order concerning the ownership or transfer of ownership of a book entry treasury bill. To effect a transfer the depository owner must make a certified request.

Defendant has no other known assets. Because plaintiff has been unable to satisfy its judgment and because defendant has illustrated a willful desire to avoid satisfaction of the judgment

by not filing a supersedeas bond, by deeding by gift a valuable parcel of land, and by purchasing treasury bills which cannot be attached, the Court will grant plaintiff's motion. Defendant will not be allowed to avoid the plaintiff's right to satisfy its judgment.

Rule 65 provides that a temporary injunction may be issued when there is a reasonable likelihood of success upon the merits, lack of adequate remedy at law, the prospect of irrepairable harm and a less significant hardship on the party enjoined. *Banks v. Trainor*, 525 F. 2d 837, 841 (7th Cir. 1975). No one factor is determinative and the District Court is given discretion to fashion suitable temporary relief. Id.

It is clear that plaintiff has exhausted his legal remedies. It is further clear that plaintiff could suffer irrepairable harm. Defendant has refused to file a supersedeas bond and has converted or given away his assets in attempt to prevent execution.

Finally, there will be little hardship to defendant if ordered to not cash or transfer the bills. Therefore, since plaintiff is without an adequate legal remedy, equitable relief is appropriate. *Ball v. Peper Cotton Press Co.*, 121 S.W. 798 (Mo. App. St. Louis 1909). The Court will order defendant not to cash or transfer his ownership in the bills. Plaintiff has already posted bond in the amount of $10,000.00, which is sufficient. The Court will order defendant to cash the bills and pay the proceeds over to plaintiff in an amount sufficient to satisfy the judgment. This order will be stayed pending appeal. Pending the final judgment of the Court of Appeals, the defendant will be ordered to deposit his receipts for the treasury bills with the clerk of this court in an amount sufficient to pay the judgment, interest and costs, i.e., $130,000.00.

Dated this 31st day of July, 1978.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX D

United States Court of Appeals
For the Eighth Circuit

No. 78-1427. September Term, 1978

Merrill Lynch, Pierce, Fenner & Smith, Inc., etc., Appellee, vs. Sam Goldman, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Petitions of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and they are hereby, denied.

April 5, 1979

United States Court of Appeals
For the Eighth Circuit

No. 78-1622. September Term, 1978

United States, ex rel., Sam Goldman, Petitioner/Appellant, vs. Hon. James H. Meredith, etc., et al., Respondents/Appellees.	Appeal from the United States District Court for the Eastern District of Missouri and Petition for Writ of Mandamus and/or Prohibition

Petition of appellant/petitioner for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 9, 1979

United States Court of Appeals
For the Eighth Circuit

No. 78-1622. September Term, 1978

United States, ex rel. Sam Goldman, Petitioner-Appellant,

vs.

The Honorable James H. Meredith, Chief Judge,

The Honorable John F. Nangle, Judge,

W. H. Blumenthal, Secretary of the Treasury,

Respondents.

Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Appellee.

Petition for Writ of Mandamus and/or Prohibition and Appeal from the United States District Court for the Eastern District of Missouri.

On motion of Appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

May 9, 1979

APPENDIX E

EXHIBIT 1

Printed in U.S.A.

NEW ACCOUNT INFORMATION
FOR COMMODITY SPECULATIVE ACCOUNTS

STENCIL HERE MAY 24 1976

FOR NEW ACCOUNTS DEPARTMENT ONLY		
Word	Check Off Necessary Papers	Follow Ing Up
	CODE 86	
	CODE 94	
	CODE 688	
	CODE 117	
	CHARTER	
	EMPLOYER LTR	
N/A (Date Stamp)	MAY 21 1976	
N/A	N/A CLERK STAMP	

Cmdy Acct. No. 685-35369
Date Cmdy Acct. Opened 5/4/76
Business Phone 314-727-0800
Residence Phone Same as above
Taxpayer Ident. No. 490-444-295
Soc. Sec.-Corp. Ident.
Passbook
Alien Reg. No.

MR SAM GOLDMAN
6632 SAN BONITA
CLAYTON MO 63105

NEW CLIENT: Yes [X] No [ ] Married [X] Single [ ] No. of Dependents 0
IS CLIENT OVER 21 YEARS OF AGE: Yes [X] No [ ]
HOW LONG HAVE YOU KNOWN CLIENT two months
OF WHAT COUNTRY IS CLIENT A CITIZEN U.S.A.
SOURCE OF ACCOUNT: Direct Mail Lead [ ] Advertising Lead [ ] Forum Lead [ ] Personal Call [X] Other

BUSINESS STRUCTURE (If Applicable)
SOLE PROPRIETORSHIP [X]
PARTNERSHIP [ ]
CORPORATION [ ]

Full Name Mr. Sam Goldman
IF CLIENT IS MARRIED, SHOW SPOUSE'S EMPLOYER AND OCCUPATION UNDER "OTHER COMMENTS" BELOW
Mailing Address 6632 San Bonita (STREET) Clayton, (CITY) Missouri (STATE) 63105 (ZIP CODE)
Home Address SAME (IF SAME AS MAILING ADDRESS, WRITE SAME)
Employed By Self Address Home address
Nature of Business Manufacturers Rep. Position Held Owner
Has Client Ever Done Business With Another Broker Yes [ ] No [X]
Name of Broker
Current Stock And Commodity Equity At Other Broker $ 500,000
Has Client Done Commodity Business With Another MLPF&S Office Yes [ ] No [X]
Office At PREVIOUS CMDY ACCT NO
If Power of Attorney In Whose Favor (FULL NAME AND CMDY ACCT NO IF ANY) Relationship To Customer Friend
Related Cmdy. Accts. (If None – State None) None And Other Comments
Bank Reference And Branch Location 10/62 Low 4 bal 926-3566 5/3/76 OK aaaa Clayton Bank - Clayton, Missouri St. Louis County National

SIGNATURE OF ACCOUNT EXECUTIVE OPENING ACCOUNT 8189

TO BE COMPLETED ON ALL SPECULATIVE ACCOUNTS BY OFFICE MANAGER EVERY QUESTION MUST BE ANSWERED

Is Client Experienced in Futures Speculation Yes Estimate of Customer's ANNUAL INCOME $ 50,000
Estimated NET WORTH (Exclusive of Equity in Home) $ 2,000,000
Current Equity in Client's Merrill Lynch Security Accts. $ and M.L. Cmdy. Accts. $ 7,000
Client's Merrill Lynch Security Account Numbers
Estimated Risk Capital Available For Commodity Trading $ 100,000 How Did You Determine Customer's Estimated Financial Position Asked
Suggested DOLLAR TRADING LIMIT (Maximum Margin Requirements At Any One Time) Based On Your Estimate Of Client's Financial Situation and Temperament $ ~~30,000~~ 25,000 (Subject to Periodic Review) How You Advised A/E Accordingly
Are You Satisfied That This Customer is a Desirable Speculative Commodity Account Yes
Has Anyone Discussed Risk of Commodity Trading With Customer Yes If So, Who

5/14/76 DATE — APPROVED (Office Manager) — REVIEWED BY (Commodity Division) — ACCEPTED BY (Commodity Division)